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In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

JOHN T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

v.

DANIEL MORGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of John T. Willingham and C. A. Jarvis, the Warden and Chief Medical Officer of the federal penitentiary at Leavenworth, Kansas, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on October 5, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–21) is reported at 383 F. 2d 139. The opinions of the district court (App. B and C, *infra*, pp. 23–28, 29–42) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1967. A timely petition for rehearing was denied on March 11, 1968. On June 10, 1968, Mr.

Justice White extended the time for filing a petition for certiorari to and including June 24, 1968. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the warden and chief medical officer of a federal penitentiary are entitled to remove an action brought in a state court by a federal prisoner, based upon torts allegedly committed within the prison walls, under 28 U.S.C. 1442(a)(1), which authorizes the removal to a federal court of civil actions brought against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *."

2. Whether the court of appeals was correct in holding that the "color of office" test for removal of a suit by a federal official is "much narrower" than the standard of official immunity from suit as delineated in *Barr* v. *Matteo*, 360 U.S. 564.

STATUTE INVOLVED

28 U.S.C. 1442 provides, in pertinent part:

> *Federal Officers sued or prosecuted.*
> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or

punishment of criminals or the collection of the revenue. * * *

STATEMENT

A tort action was brought in a Kansas state court by Daniel Morgan, a prisoner at the United States Penitentiary in Leavenworth, Kansas,[1] against John T. Willingham, the prison warden, and C. A. Jarvis, its chief medical officer, and 75 unidentified co-defendants.[2] The complaint alleged, primarily, that defendants (petitioners here) had twice caused plaintiff (respondent here) to be inoculated with a "deleterious foreign substance, serum or drug," resulting in various injuries, and did "assault, batter, club, choke, and torture the plaintiff," causing him serious injury (App., pp. 16, 24–25, 30–31). Respondent sought a total of $2,200,000 in damages from petitioner Willingham, and a total of $1,065,000 in damages from petitioner Jarvis.

The case was removed to the United States District Court for the District of Kansas, upon a verified petition for removal, filed by Willingham and Jarvis, based upon 28 U.S.C. 1442(a)(1). The petition stated:

> That any act or thing that these petitioners, or either of them may have done or authorized to be done concerning the plaintiff as alleged

[1] Morgan is no longer incarcerated at the Leavenworth prison, having been mandatorily released on May 9, 1968.

[2] The complaint named as additional defendants "The First Doe Corporation, The Second Doe Corporation, The Roe Company and Doe numbers 1 through 72." No additional defendants were ever identified, however, and the complaint was simply dismissed as to the named defendants Willingham and Jarvis (App., p. 42).

> and complained of by plaintiff in his said complaint or petition, was done and made by them in the course of their duties as officers of the United States of America and as persons acting under officers of the United States of America and under color of such offices and by virtue thereof; namely, as warden of the United States Penitentiary at Leavenworth, Kansas and as an employee of the United States Public Health Service assigned to the United States Penitentiary at Leavenworth, Kansas, respectively; and that the acts complained of were made solely under color of their respective offices and within the scope of their authority.

Respondent moved to remand the action to the State court, asserting generally that petitioners "were not employed nor were they under any obligation or duty to the United States to commit any of the several torts alleged," and that the commission of such torts was "a frolic of their own which had no relevancy to their official duties" (see App., pp. 31–32).

Petitioners moved for summary judgment, on the ground that, as federal officers engaged in their duties, they were immune from respondent's suit. The district court denied respondent's motion to remand the case to the State court, and granted petitioners' motion for summary judgment. Relying on uncontradicted affidavits of Willingham and Jarvis, which described their official duties in detail and stated that their only contact with Morgan had been inside the walls of Leavenworth Penitentiary, in the perform-

ance of their official duties, the district court ruled that Willingham and Jarvis were immune from the suit under the doctrine of *Barr* v. *Matteo*, 360 U.S. 564 (App., pp. 29–42). Accordingly, it dismissed the complaint.

The court of appeals reversed, without reaching the issue whether the district court had been correct in concluding that petitioners were immune from the suit. Instead, that court held that the "color of office" test for removal by federal officials under 28 U.S.C. 1442(a)(1) is "much narrower" than the "official immunity" standard (App., p. 20). The court further stated that while the record "may have adequately supported the finding of immunity," it did not sufficiently establish that the alleged acts were committed under "color of office" (*ibid.*). It therefore remanded the case to the district court "for a factual determination of this issue" (App., pp. 20–21).

REASONS FOR GRANTING THE WRIT

The holding of the Tenth Circuit that the "color of office" test for removal of an action under 28 U.S.C. 1442(a)(1) is significantly narrower than the standard for determining a federal officer's immunity from suit, and that an extensive factual hearing is necessary before deciding whether federal prison officials are acting under color of office in allegedly committing torts against a prisoner, is erroneous. The decision below is based upon a misreading of the plain language of the removal statute, and seriously undermines the congressional purpose in enacting that provision. Moreover, the court's holding and its under-

lying rationale are in direct conflict with rulings of at least two circuits—the Second and the Fifth—at least impliedly approved by this Court, that such a suit may properly be removed upon "the allegation that petitioners were officers acting under color of office in the employment of the United States * * *" (*Allman* v. *Hanley,* 302 F. 2d 559, 562 (C.A. 5)). Finally, the ruling below tends to undercut the immunity of federal officials from suit for acts done in the line of duty since the factual hearings it would apparently require to resolve the removal issue might well be tantamount to the litigation from which the doctrine of *Barr* v. *Matteo,* 360 U.S. 564, seeks to protect such officials.

1. The ruling below that the "color of office" test for removal of the suit by a federal official has a "much narrower" reach than the standard for official immunity from suit—*i.e.,* whether the individual was acting "within the outer perimeter of [his] line of duty" (*Barr* v. *Matteo,* 360 U.S. at 575)—has no sound basis and defeats the purpose of the law in this area. Even an officer who goes beyond the outer perimeter of his assigned duties may nevertheless be acting under a claim or "color" of his office. Yet the court below, while noting that the undisputed evidence "may have adequately supported the finding of immunity," concluded that it was nonetheless "insufficient to support" a determination that the alleged acts were performed under color of office for removal purposes (App., p. 20). This turns the law topsy-turvy.

In analogous circumstances this Court has consistently read "color of law" provisions broadly (*e.g.,*

Screws v. *United States*, 325 U.S. 91; *Williams* v. *United States*, 341 U.S. 97; *Monroe* v. *Pape*, 365 U.S. 167). Moreover, the manifest purpose of the removal statute is to protect federal officers from vexatious litigation in a potentially unfavorable forum. That protection serves the national purpose of avoiding any undue interference by the state courts with activities essentially federal in character. Thus, the removal statute of necessity has a broader, not a more limited, scope than the official immunity standard.[3]

The holding below also impairs the purposes of the official immunity doctrine. The necessary result of the ruling that there is a more stringent "factual" test for removal than for official immunity will be to sub-

[3] Removal to federal courts of suits brought in State courts against certain classes of federal officers has been provided for ever since the enactment of the Federal Judiciary Act in 1789 (see *Tennessee* v. *Davis*, 100 U.S. 257, 267). Various opinions of this Court have traced the development of the removal concept and have discussed the reasons underlying the statutory provisions. *E.g.*, *Tennessee* v. *Davis*, 100 U.S. at 262–265; *Gay* v. *Ruff*, 292 U.S. 25, 32–34. While originally limited to revenue officers, the statute has been successively extended to the point where, in its present form, it covers all federal officers. See, *e.g.*, H. Rep. No. 308, 80th Cong., 1st Sess., p. A134 (1947). Throughout the removal statute's history, it has been recognized that the basic purpose underlying the provisions is to protect the interests of the national government by shielding its agents from litigation regarding their official duties in a potentially unfavorable or parochial forum; thus, it is essentially an incident of federal supremacy. For a general discussion of 28 U.S.C. 1442, see 1A Moore, *Federal Practice* ¶ 0.164, pp. 821–839 (1965). Interestingly, Moore specifically points out the Section 1442 creates "a jurisdictional right of removal quite apart from the general removal statute," and requires no separate basis of federal court jurisdiction (*id.* at 825, 837–838.)

ject federal officials to oppressive litigation from which the immunity doctrine purports to protect them. As was pointed out in *Barr* v. *Matteo* (360 U.S. at 571):

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[4]

A requirement for extensive factual hearings on the removal issue would entail the expenditure of time and energies and inhibit governmental officials in carrying out their duties no less than if they were compelled to defend against groundless suits on the merits. Moreover, it can hardly be believed that Congress, in enacting 28 U.S.C. 1442(a)(1), intended that a federal court would be required not only to reach the merits of the immunity defense but to go further and apply a higher standard in deciding whether the suit was within its jurisdiction as having been properly removed.

2. The ruling below directly conflicts with decisions of the Second and Fifth Circuits. *E.g., Allman* v.

[4] See also *Howard* v. *Lyons*, 360 U.S. 593 (decided along with *Barr* v. *Matteo*); *Spalding* v. *Vilas*, 161 U.S. 483; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949 (quoted from at length in *Barr* v. *Matteo*, 360 U.S. at 571–572); *Norton* v. *McShane*, 332 F. 2d 855 (C.A. 5), certiorari denied, 380 U.S. 981.

Hanley, 302 F. 2d 559, 561 (C.A. 5); *Poss* v. *Lieberman,* 299 F. 2d 358 (C.A. 2), certiorari denied, 370 U.S. 944; see also *Rachel* v. *Georgia,* 342 F. 2d 336, 340 (C.A. 5), affirmed, 384 U.S. 780, 793.[5] As stated in *Allman* v. *Hanley,* 302 F. 2d at 562, "the allegation that petitioners were officers acting under color of office in the employment of the United States was sufficient [for the statute] requires only a short, plain statement of facts entitling a defendant to removal." In the instant case, it is undisputed that petitioners' only contacts with respondent were within the walls of the Leavenworth prison. It seems absurd to suggest that the activities within a prison of that institution's warden and chief medical officer are not even under "color" of their offices. Indeed, the opinion primarily relied upon by the Tenth Circuit, *Maryland* v. *Soper,* 270 U.S. 9, 33, stated that

> * * * the statute does not require that the prosecution must be for the very acts which

[5] Decisions of several other circuits are also implicitly in conflict with the approach taken here by the court below. See *Sarner* v. *Mason,* 228 F. 2d 176, 178 (C.A. 3); *Meredith* v. *Van Oosterhout,* 286 F. 2d 216, 219 (C.A. 8), certiorari denied, 365 U.S. 835; cf. *O'Campo* v. *Hardisty,* 262 F. 2d 621, 624 (C.A. 9); *Murphy* v. *Kodz,* 351 F. 2d 163, 165 (C.A. 9); *Preble* v. *Johnson,* 275 F. 2d 275 (C.A. 10). Other decisions in the Second and Fifth Circuits are in accord with the holdings in the *Allman* and *Poss* cases on this issue. *Ove Gustavsson Contracting Co.* v. *Floete,* 299 F. 2d 655, 660 (C.A. 2), certiorari denied, 374 U.S. 827; *Blitz* v. *Boog,* 328 F. 2d 596, 600 (C.A. 2); *DeBusk* v. *Harvin,* 212 F. 2d 143, 146 (C.A. 5); *State of Texas* v. *National Bank of Commerce of San Antonio,* 290 F. 2d 229, 231 (C.A. 5), certiorari denied *sub nom. Falkner, Banking Commissioner* v. *National Bank of Commerce of San Antonio, Texas,* 368 U.S. 832.

> the officer admits to have been done by him under federal authority. It is enough that his acts *or his presence at the place in performance of his official duty* constitute the basis, though mistaken or false, of the state prosecution. [Emphasis added.]

Here it seems evident that the Tenth Circuit has lost sight of the purposes of the removal statute.[6] In this regard, the Second Circuit pointed out in *Poss* v. *Lieberman,* 299 F. 2d at 359, that:

> Where a federal officer asserts a privilege for acts done under color of his office the defense is based upon a federal right, the purpose of which is to prevent federal employees from being unduly harassed by "vindictive or ill founded damage suits brought on account of action taken in the exercise of their official responsibilities" * * *. Consequently, the federal government has a special interest in such matters which justifies the granting of removal jurisdiction to the federal courts in such cases. * * *

Nor can the decision below properly be justified on the ground that 28 U.S.C. 1442(a)(1) should be "narrowly" construed to avert improper infringements upon legitimate interests of the states (App., p. 18) Removal from a state court of a suit by a federal prisoner against federal prison officials based upon torts allegedly committed within the walls of a federal prison scarcely endangers the delicate balance between

[6] The removal statute should be construed, of course, to give full effect to the purposes for which it was enacted. See *Venable* v. *Richards*, 105 U.S. 636, 638; *Colorado* v. *Symes*, 286 U.S. 510, 517; see also note 3, *supra*.

state, and national governments which exists in our federal system.[7] Indeed, the removal provisions seem peculiarly applicable to suits brought against federal prison officials in state courts. Otherwise, a state court would be faced with the necessity of construing and applying statutes and regulations of the federal government relating to the management of federal penal institutions, although the alleged acts took place within the exclusive jurisdiction of the United States and are of little if any concern to the particular state. See *Horne* v. *Aderhold,* 1 F. Supp. 690 (N.D. Ga.); *Jones* v. *McGill,* 46 F. 2d 334 (D. N.H.). That is precisely the kind of thing Congress intended should not happen in enacting and expanding the removal statute.

3. We recognize that the decision below is interlocutory in the sense that it remands the cause to the district court for further hearings on whether the activities of petitioners were "under color of office" (App. pp. 20–21). Of course, since this case comes

[7] The Tenth Circuit also relied upon several district court decisions for the proposition that suits based on allegedly "negligent" or "wrongful" performance of activities of a federal official, otherwise under color of office, are not removable because of such allegations (App., pp. 18–19). Those decisions are erroneous, and contrary to more persuasive opinions. See, *e.g., Logemann* v. *Stock,* 81 F. Supp. 337, 339 (D. Neb.); see also *Perez* v. *Rhiddlehoover,* 247 F. Supp. 65, 71 (E.D. La.), where the court stated: "The determinative feature for removal is the status of the defendant as a federal official. Any contention that the character of the alleged violation is controlling ignores the plain language and well-known purpose of the removal statute."

Significantly, neither the *Allman* nor the *Poss* case (see *supra,* pp. 8–9) was referred to in the opinion of the court below.

from a federal, not a state court, the lack of a final judgment does not preclude this Court's exercise of its certiorari jurisdiction (compare 28 U.S.C. 1254(1) with 28 U.S.C. 1257(3)). And while the Court has considered the interlocutory nature of a case coming from a federal court as an important factor to be considered in determining whether to grant certiorari (see, *e.g., Land* v. *Dollar,* 330 U.S. 731), it has repeatedly indicated that this factor is not dispositive and that certiorari will nevertheless be granted where there is a clear-cut legal issue which is important to the further conduct of the case (*e.g., Aetna Casualty & Surety Co.* v. *Flowers,* 330 U.S. 464; see generally Stern & Gressman, *Supreme Court Practice* §§ 2–2, 4–19 (3d ed.), and cases there discussed). For several reasons, the instant case appears to fit plainly within the category of established exceptions to the finality rule.

In the first place, the court of appeals' ruling, if not reviewed now, may improperly subject petitioners, and numerous other federal officials similarly situated in future cases, to vexatious proceedings from which they are presumably immunized as a matter of law. Such proceedings would at least include the factual hearings on the "color of office" issue for which the court below here remanded to the district court. Moreover, the decision below, if not reversed, is likely to result in a number of erroneous remands of such cases to state courts for determination of the official immunity question and, at least in some cases, for a full-blown state court trial if the immunity defense is rejected. Since district court orders remand-

ing cases to state courts are not reviewable (see 28 U.S.C. 1447(d)),[8] the harmful effects of the decision may go unchecked for a substantial period of time before the issue could again be presented to this Court. Finally, the error of the decision below is manifest, and the conflict among the circuits is plain. Hence, we submit, review at this point is fully warranted.

CONCLUSION

For the foregoing reasons, certiorari should be granted, the judgment of the court below should be reversed, and the case should be remanded for a determination whether petitioners were properly held immune from respondent's suit.

Respectfully submitted.

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Attorneys.

JUNE 1968.

[8] There is no doubt, however, that this Court may review an order of a court of appeals requiring a federal district court to remand a case to a State court. See *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464.

APPENDIX A

United States Court of Appeals
Tenth Circuit

September Term 1967

No. 9281

DANIEL MORGAN, APPELLANT

vs.

JOHN T. WILLINGHAM AND C. A. JARVIS, APPELLEES

Appeal from the United States District Court for the District of Kansas

SUBMITTED ON THE BRIEFS

Appellant pro se.

Newell A. George, United States Attorney and *James R. Ward,* Assistant United States Attorney, Topeka, Kansas, for appellees.

Before MURRAH, Chief Judge, WILBUR K. MILLER,* Senior Circuit Judge and HICKEY, Circuit Judge.

MURRAH, *Chief Judge.*

This is an appeal from an order granting a motion for summary judgment in favor of appellees Willingham and Jarvis and dismissing the complaint and cause of action brought against them by appellant, a prisoner at the United States Penitentiary, Leavenworth, Kansas.

* Of the United States Court of Appeals for the District of Columbia sitting by designation.

310-118—68——3

Morgan filed this action for damages totaling more than $93,000,000 in the Leavenworth County District Court. The summons and complaint named Willingham and Jarvis, the Warden and Chief Medical Officer at the Penitentiary as the principal defendants.[1] The appellees, through their attorney, filed a general answer in the Leavenworth County District Court. The action was then removed to the United States District Court for the District of Kansas.[2]

The appellant then filed a verified motion to remand the cause to the state court. This motion was denied but the trial court stated that it would consider a renewed motion if the facts, as subsequently developed, showed the defendants were not acting under color of office.

In substance, the complaint[3] charged that Willingham, Jarvis and others ordered unqualified penitentiary inmates to inoculate the appellant with a "deleterious foreign substance, serum, or drug" which resulted in permanent injury to him. The complaint further alleged that Willingham, Jarvis and others "out of malice * * * did willfully, wantonly or wrongfully, and contrary to the law, assault, batter, club, choke and torture the plaintiff severely injuring [him]."

[1] Numerous unidentified individuals and corporations were also named as defendants. Since the complaint was never amended to properly identify them nor were they served with process, they did not become proper parties in the action below and we do not consider any claims against them in this opinion.

[2] The record shows that all the requirements of 28 U.S.C. § 1446 were satisfied.

[3] Five of the original ten counts were dismissed on motion of the appellant. Two of the remaining five counts relate to actions of the unidentified corporate defendants and form no part of this appeal. We are therefore only concerned with Counts IV, V and IX of the original complaint.

The appellees then filed a motion for summary judgment and included affidavits of both Willingham and Jarvis. Appellant filed a verified opposition to the motion for summary judgment. In granting the motion, the trial court held that the plaintiff failed to "overcome the undisputed fact that all of the activities of the defendants Willingham and Jarvis and their conduct come within the ambit of their duties and responsibilities as Warden and Chief Medical Officer respectively of the penitentiary and the charge that they acted maliciously and without provocation or while under the influence of intoxicating liquor does not remove or restrict the broad rule of immunity."

This appeal presents two major issues which although related must be treated separately since the authority for the court's action comes from different sources. The primary issue is whether the court properly granted appellee's petition for removal or whether it erred in failing to remand the cause to the state court. The secondary issue is whether the trial court correctly found appellees immune from prosecution and granted summary judgment as to them. For the reasons which follow, we do not reach this secondary issue.

This action was removed to the federal courts under the provision of 28 U.S.C. § 1442(a)(1). This section provides for removal of an action commenced in a state court if the defendants are officers of the United States or agency thereof or persons acting under such office and the act complained of was either "under color or such office" or "on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals." It cannot seriously be disputed that the appellees fall within the class of persons covered by the section. The more

difficult question concerns whether the acts complained of were committed "under color of office."

It should first be emphasized that § 1442, like the common law doctrine of immunity, presents different standards for different classes of federal personages. An officer of the federal court may remove an action against him if the act was "under color of office or in the performance of his duties." § 1442(a)(3); and see *Jones* v. *McGill*, 46 F. 2d 334 (D. New Hampshire 1931); *Simpson* v. *McVey*, 217 F. Supp. 575 (S.D. Ohio 1963). A congressional officer may remove an action if the act was "in the discharge of his official duty under order of (either House of Congress)." § 1442(a)(4). In this respect, the removal statutes parallel the common law doctrine of immunity which applies broadly to judicial officers and narrowly to agents of the Executive Branch of the Federal Government.

There is abundant support for the proposition that the "color of office" test which applies to these appellees provides a rather limited basis for removal. *State of Ohio* v. *Dorko*, 247 F. Supp. 866 (N.D. Ohio 1965); *Nass* v. *Mitchell*, 233 F. Supp. 414 (D. Maryland 1964); *Brenner* v. *Kelly*, 201 F. Supp. 871 (D. Minn. 1962); *Goldfarb* v. *Muller*, 181 F. Supp. 41 (D. N.J. 1959). Those courts have rejected the contention that the words "under color of office" mean no more than "in the course and scope of employment." Circuit Judge Goodrich suggested that "to make scope and course of employment the test for 'color of office' is * * * to twist the statute out of its rational construction and go far beyond anything that Congress could possibly have intended in its enactment (of the removal statutes)." *Ebersole* v. *Helm*, 185 F. Supp. 277, 278 (E.D. Penn. 1960). This rationale accounts

for the numerous decisions which hold that removal of a civil suit or criminal prosecution which resulted from the operation of a motor vehicle by one who was clearly acting within the course and scope of his official government employment is improper and that the case must be remanded to the state court. *State of Ohio* v. *Dorko, supra; Nass* v. *Mitchell, supra; Galbert* v. *Shivley,* 186 F. Supp. 150 (W.D. Ark. 1960); *Ebersole* v. *Helm, supra; Goldfarb* v. *Muller, supra; Fink* v. *Gerrish,* 149 F. Supp. 915 (S.D.N.Y. 1957); *State of Oklahoma* v. *Willingham,* 143 F. Supp. 445 (E.D. Okla. 1956). *Contra Pepper* v. *Sherrill,* 181 F. Supp. 40 (E.D. Tenn. 1958); *City of Norfolk* v. *McFarland,* 143 F. Supp. 587 (E.D. Va. 1956).

In *Brenner* v. *Kelly,* 201 F. Supp. 871 (D. Minn. 1962), a case which is somewhat analagous to the case at bar, the court held that doctors employed in the Veterans' Administration Hospital were not entitled to remove a malpractice action originally filed in the state court. The holding seems to be premised on the belief that while federal doctors act under the color of office, when operating properly they are not required nor are they authorized to negligently treat patients entrusted to their care and when they do so, they do not act under color of office. To be eligible for removal the defendant must exclude the possibility that the suit is based on acts or conduct not justified by his federal duty. *Maryland* v. *Soper,* 270 U.S. 9, 33.

In the case at bar, the trial court erroneously equated the standards which govern common law immunity with those which determine the statutory eligibility for removal of an action commenced in a state court. The only undisputed evidence was that the only contact the appellees had with the appellant

occurred within the walls of the penitentiary.[4] While this may have adequately supported the finding of immunity, we find it insufficient to support the requisite determination that the alleged acts were performed under "color of office."

We are thus faced with an apparent divergence in the criteria for the removal of proceedings against federal officers in the state courts and the criteria for determining if the federal officer is immune from prosecution in suit for damages in the federal court. While this divergence is indeed regrettable, its cause is not unrecognizable. The doctrine of official immunity stems from a common law doctrine which has been expanded by the courts in recent decisions.[5] The test for removal is not based on the evolution of the common law doctrine of immunity, but is a creature of statute and the courts are bound by the language of the statute. The test for removal is not the same as the test for immunity for the former is much narrower than the latter. If these standards are to be equated it must be done through legislative action and not through judicial expansion of the removal statutes.

We conclude that the record fails to establish that the alleged acts were committed under "color of office." The cause must be remanded for a factual

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[4] We agree that the conclusionary statements contained in the appellant's verified answer to the motion for summary judgments were inadmissible under Rule 56(e), Federal Rules of Civil Procedure. However, the statements in appellees' affidavits that their only contact with appellant was in performance of their duties was equally conclusionary and inadmissible. *Stone* v. *Phillips*, 245 F. Supp. 247 (D. Colo. 1965).

[5] Compare *Norton* v. *McShane*, 332 F. 2d 855 (5 CA 1964) cert. den. 380 U.S. 981, with *Kelley* v. *Dunne*, 344 F. 2d 129 (1 CA 1965).

determination of this issue.[6] If the evidence does not establish that the alleged acts were committed under "color of office", the cause must be remanded to the state court.

Reversed and remanded.

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[6] It may be that the answers to some of appellant's interrogations would provide a factual basis for the determination of the removal question. We note that these interrogations were not answered nor do we find that appellees were excused from answering them.

APPENDIX B

In the United States District Court for the District of Kansas

CIVIL No. T–4113

DANIEL MORGAN, PLAINTIFF

vs.

JOHN T. WILLINGHAM, ET AL., DEFENDANTS

RULING ON PLAINTIFF'S MOTION TO REMAND

On July 27, 1966 plaintiff brought an action against defendants John T. Willingham and C. A. Jarvis jointly and severally charging them along with seventy-five co-defendants with torts committed "in their capacity as individuals or private persons"; the verified complaint filed in the State District Court for Leavenworth County, Kansas contained ten separate counts.

On August 15, 1966 an answer was filed by the United States Attorney for the District of Kansas in the Leavenworth County State Court which purported to be an answer of defendants John T. Willingham and C. A. Jarvis denying in general terms the charges and accusations of the complaint. This answer consisted of what might be termed a general denial.

On August 25, 1966 the defendants Willingham and Jarvis filed in this Court their petition for removal of action to the United States District Court from the State District Court of Leavenworth County, Kansas. An appropriate bond for removal was approved and

filed and the matter was removed to this Court in the manner prescribed by law.

Thereafter and on September 2, 1966 plaintiff herein filed a motion to remand the action to the State Court from which it had been removed.

Upon hearing before this Court the plaintiff requested leave to dismiss Counts 1, 2, 3, 8 and 10 of his original verified complaint. The Court sustained this motion and there remains for consideration before the Court the claims and charges asserted in Counts 4, 5, 6, 7 and 9. Count 4 of the complaint charges in substance that defendant ordered and utilized penitentiary inmates and other persons not qualified to administer dangerous drugs to him and to practice medicine in the State of Kansas and to innoculate him with deleterious foreign substances, serum or drugs resulting in his permanent injury; in Count 5 plaintiff charges that as a result of the injection of serum or drug into his body by defendants he was caused to lose consciousness, fall to the concrete floor and injure his head and various parts of his body; in Count 6 plaintiff charges defendants with negligently and wrongfully manufacturing and engaging in the transshipment, facilitation, sale, delivery or distribution, for human use or consumption, certain deleterious foreign substances, vaccines, serums or drugs capable of causing death or serious injury to the user or recipient without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and failing to ineluding adequate directions for its proper use, all of which caused injury and hurt to the plaintiff; Count 7 charges that as a direct result of the use of such drugs and serums, the plaintiff was caused to lose consciousness and fall to a concrete floor and as a result suffered the injuries described in Count 5; in Count 9 the defend-

ants are charged with wilfully, wantonly and wrongfully and contrary to law, assaulting, battering, choking and torturing the plaintiff, and severely injuring him in various parts of his body.

In their petition for removal the defendants assert that the defendant Willingham is and was at all times pertinent the Warden of the United States Penitentiary at Leavenworth, Kansas in which place plaintiff was confined by a lawful judicial judgment; that the defendant C. A. Jarvis is and was at all times pertinent an employee of the United States Public Health Service assigned to the United States Penitentiary at Leavenworth, Kansas, and as such was an officer of the United States and a person acting under officers of the United States; that any act or thing that the defendants or either of them may have done or authorized to be done concerning the plaintiff as is alleged in his complaint, was done and made by them in the course of their duties as officers of the United States and as persons acting under officers of the United States and under color of such officers and by virtue thereof; that pursuant to the provisions of Title 28 United States Code § 1442(a)(1) petitioners are entitled to have the cause removed to the United States District Court for the District of Kansas. The defendants further assert in their petition for removal that they do not know the identity of any of the persons referred to as First Doe Corporation, Second Doe Corporation, and Roe Company and Doe numbers 1 through 72, as co-defendants with them.

The Court has reviewed authorities cited by the plaintiff in support of his contentions that this is an action brought against the defendants personally and not against them as officers of the United States, and that they are personally liable to him for their tortuous acts committed as individuals with malice and

purposely. That defendants would be personally liable to plaintiff in the State of Kansas under such circumstances can scarcely be questioned. See *Farmer* v. *Rutherford,* 136 Kan. 298, 15 P. 2d 474.

Though this is the law of Kansas, the defendants here seek to remove the action brought against them under the provisions of Section 1442, Title 28 U.S.C. Section (a)(1) provides that:

> "Any officer of the United States or any agency thereof or person acting under him for any act under color of such office or on account of any right, title or authority claimed under any Acts of Congress for the apprehension or punishment of criminals or the collection of the revenue."

An examination of the authorities reveal that under the Removal Statute, 28 U.S.C. § 1441, before a case can be removed it is necessary for the facts upon which the removal is based to appear on the face of the complaint or subsequent amendments thereto, filed by the plaintiff. *Romick* v. *Beckins,* 197 F. 2d 369. This is because the action may be removed under Section 1441 only where it is one over which the federal courts would have original jurisdiction in the first instance. But this rule does not apply where a defense is asserted based upon a federal right of removal granted under the provisions of 28 U.S.C. § 1442(a)(1) under which the removal of this case was sought and obtained. The removal in this case is based on federal interest in the matter, the facts underlying which may be stated in the removal petition itself, and from it determined whether or not federal jurisdiction existed over the claim as stated in the complaint as originally filed and served.

Where a federal officer asserts a privilege for acts done under color of his office, the defense is based upon a federal right, the purpose of which is to

prevent federal employees from being unduly harassed by vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. *Barr* v. *Matteo,* 360 U.S. 564. The federal government has a special interest in such matters which justifies the granting of removal jurisdictions to the federal court in such cases. Congress has not in Section 1442, as in Section 1441, required that the case be one over which the Court have original jurisdiction in order for the defendant to obtain removal. In the revision of Title 28 United States Code, Act of June 25, 1948, c. 686, 62 Stat. 938, the right of removal was extended to apply to all officers and employees of the United States or any agency thereof. See Revisor's note 28 U.S.C.A. § 1442. As the case now stands before the Court, the motion to remand must be denied. Necessarily if, upon hearing of the case, it should develop that the acts of the defendants though allegedly done by them while acting under color of their office, were not so committed, then the Court, upon a renewal of plaintiff's motion to remand, would further consider it.

The Court is aware, as plaintiff urges, that the government is not liable for the intentional torts of its employees, 28 U.S.C. § 2680(h), but where the issue is raised by proper and sufficient allegations in the petition for removal as here, that whatever acts were done by the defendants or either of them, were acts required of them in performance of their responsibilities and duties as public officers and performed under color of such office, then the action becomes removable and the issue presented to this Court for determination. The case of *United States* v. *Muniz,* 374 U.S. 150, an examination of this decision reveals that it was an action maintained by a federal prisoner under the Federal Tort Claims Act to recover damages he suffered for personal injuries sustained by

him during confinement in a federal prison and resulting from negligence of a government employee. The Court simply held that such an action is maintainable. This is no authority for the contentions advanced by plaintiff here.

The right of removal of this cause, as sustained under the pleadings by *Jones* v. *McGill,* 46 F. 2d 334, and *Poss* v. *Lieberman,* 299 F. 2d 358.

In cases removed under Section 1442 of the statute, it is not necessary that all of the parties defendant join in the petition for removal. A single federal officer may obtain removal and this ends the power of the State Court to issue process because the entire case comes to the jurisdiction of the Federal Court. See *Allman* v. *Hanley,* 302 F. 2d 559.

It follows that plaintiff's motion to remand this cause to the State Court must be and is hereby overruled and denied.

There remains for the Court's consideration in this matter the motion of the defendants Willingham and Jarvis for summary judgment. Plaintiff was granted fifteen days from October 13, 1966 to file answer to the Government's brief, after which the Court will rule upon such motion.

DATED at Topeka, Kansas this 18th day of October, 1966.

/s/ GEORGE TEMPLAR
United States District Judge

APPENDIX C

In the United States District Court for the District of Kansas

No. T–4113

DANIEL MORGAN, PLAINTIFF

vs.

JOHN T. WILLINGHAM, C. A. JARVIS, ET AL.,

DEFENDANTS

MEMORANDUM OF DECISION

Sustaining Motion of Defendants Willingham and Jarvis for Summary Judgment

The files and records of this case disclose that on July 27, 1966 plaintiff brought an action against defendants John T. Willingham and C. A. Jarvis jointly and severally charging them, together with 75 co-defendants for tort committed "in their capacity as individuals or private persons". The verified complaint filed in the state district court for Leavenworth County, Kansas contains ten separate counts.

On August 15, 1966 a pleading was filed by the United States Attorney for the District of Kansas in the Leavenworth County State Court which purported to be an answer for the defendants John T. Willingham and C. A. Jarvis, which answer denied in general terms the charges and accusations contained in the complaint. The answer consisted of what might properly be termed a general denial.

On August 25, 1966 defendants Willingham and Jarvis filed in this Court their petition for removal

of the action from the State Court to this Court. This Court considered the motion of plaintiff to remand the case to the District Court of Leavenworth County, Kansas and on October 18, 1966 that motion was denied and this Court retained jurisdiction of the case.

In the meantime defendants John T. Willingham as Warden of the United States Penitentiary at Leavenworth, Kansas, and C. A. Jarvis as Chief Medical Officer of that institution filed their joint motion for summary judgment in favor of defendants and against plaintiff on the grounds that all of the allegations contained in the plaintiff's pleadings and evidence in the record of the above entitled case discloses that defendants were and are immune from suit of the kind and nature alleged in plaintiff's complaint against them.

The suit as instituted by plaintiff originally contained ten counts. Plaintiff requested leave to dismiss Count 1, 2, 3, 8 and 10, which leave was granted by the Court and those Counts were dismissed. There remains for the Court's consideration the claims and charges asserted by plaintiff in Counts 4, 5, 6, 7 and 9 of the complaint. Count 4 of the complaint charges in substance that defendants ordered and utilized penitentiary inmates and other persons not qualified, to administer dangerous drugs to him and to practice medicine in the State of Kansas, and to inoculate him with deleterious foreign substances, serum or drugs resulting in his permanent injury; in Count 5 plaintiff charges that as a result of the injection of serum or drug into his body by defendants that he was caused to lose consciousness, fall to the concrete floor and injure his head and various parts of his body; in Count 6 plaintiff charges defendants with negligently and wrongfully manufacturing and engaging in the transhipment facilitation, sale, delivery or distribution,

for human use or consumption, certain deleterious foreign substances, vaccines, serum or drugs capable of causing death or serious injury to the user or recipient without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and failing to include adequate direction for its proper use, all of which caused injury and hurt to the plaintiff; Count 7 charges that as a direct result of the use of such drugs and serums, the plaintiff was caused to lose consciousness and fall to the concrete floor and as a result suffered the injuries described in Count 5; in Count 9 the defendants are charged with willfully, wantonly and wrongfully and contrary to law, assaulting, battering, choking and torturing plaintiff and severely injuring him in various parts of his body.

Plaintiff has filed his verified statement in opposition to defendants' motion for summary judgment in which he asserts that: "the acts were perpetrated by defendants out of personal hatred and private malice completely unconnected with their lawful employment, duty, authority or responsibility as officers or employees of the United States; that defendants, though employed at the penitentiary were not acting within the scope and course of their employment or in performance of any official duty or in the exercise of any rightful or lawful authority as employees of the United States; that they acted beyond and outside the outer perimeter of their line of duty as employees at the time of the acts complained of; that the acts complained of were perpetrated by defendants in violation of their instructions, regulations and orders promulgated by the Attorney General of the United States; that the acts were perpetrated contrary and in violation of the laws of Kansas and the United States; that the acts complained of had no relevancy

to the defendants' employment, duty or authority as agents of the United States; that the acts complained of were committed while defendants were on a private frolic, excursion or venture of their own and in reckless disregard of life and limb of the plaintiff and that the acts were complained of while defendants were under the influence of alcohol or other intoxicants."

These statements made by plaintiffs are conclusionary and do not change the situation about which there is no dispute; there is no question but what plaintiff was legally committed to the custody of the Warden (plaintiff swears that he was kept under lock and key). It was the duty of defendant Jarvis as Chief Medical Officer to give plaintiff such medical treatment as in his opinion plaintiff required. If in the performance of these duties and while exercising their responsiblity, the acts charged by plantiff were committed by defendants, legal aspects are not changed by the claim of plaintiff that defendants were not acting within the scope of their authority, or in course of their employment, or in exercise of any rightful authority as employees of the United States, or even that they acted contrary to the regulations and orders promulgated by the Attorney General or that the acts had no relevancy to their employment, duty or authority or that they were intoxicated. Conclusionary statements that would not be admissible in evidence at a trial (F.R.C.R.56(e)) do not support the contention made by plaintiff that the conduct of defendants was outside the scope of their authority or jurisdiction, though the acts may have been wrongful and could subject the defendants to severe criticism and condemnation. See *Walling* v. *Fairmont Creamery Company,* 139 F. 2d 318, 323.

Nor can plaintiff's right to recover be based on the

rule announced in the case of *United States* v. *Muniz*, 374 U.S. 150, for there the action was brought by a prisoner in a federal penitentiary to recover damages against the United States under the Federal Torts Claim Act because of personal injuries sustained during his confinement in a federal prison and resulting from negligence of a government employee. Furthermore the provision of the Tort Claims Act would not be available to plaintiff in this case because as stated in *Muniz*, the government is not liable for the intentional torts of its employees. The plaintiff here asserts that the outrages perpetrated against him by defendants were committed purposely and maliciously by them. Cf. *Morton* v. *United States*, 228 F. 2d 431 (DC App.)

Plaintiff insists that the defendants, by filing a general denial to his action while the case was pending in the State District Court of Leavenworth County, Kansas, failed to raise the affirmative defense of immunity as required by Rule 8(c), and that they have by such failure waived their right to now advance such a defense under guise of a motion for summary judgment under Rule 56.

As to amendments the Supreme Court has held in *Foman* v. *Davis*, 371 U.S. 178, that,

> "In the absence of any apparent or declared reason—such an undue delay, bad faith or dilatory notice on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be 'freely given'."

The Court believes that plaintiff mistakes the interpretation of the Federal Rules of Civil Procedure requiring the pleading of affirmative defenses in an

initial pleading. As was said in Barron & Holtzoff (Wright Ed.) Vol. 1A § 442 p. 709,

> "Under this (Rule 15) leave to amend pleadings should be granted freely when justice so requires, and the adverse party will not be prejudiced thereby, to clarify the issues and expedite the disposition of litigation. Indeed it is perhaps no exaggeration to say that the only reason for not allowing an amendment to a pleading is prejudice to the opposing party. * * * Prejudice may be found however, where the amendment will cause excessive delay, or where a source of evidence has become unavailable, or a statute of limitations would bar a new suit if opposing parties should lose the present action."

It does not appear that such prejudice exists in this case.

We are considering this case under defendants' motion for summary judgment, and such a motion may be filed at any time before trial and may be considered by the Court if its consideration can be determinative of the issues in the case. The Court is not limited when ruling on a motion for summary judgment to the pleadings on file but in addition to the pleadings, the Court may consider affidavits, admissions, stipulations, depositions which are submitted for or against the motion. *Hahn* v. *Bucyrus-Erie*, 8 F.R.D. 315. The Rule, 56(c), directs that the judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogations, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A defendant need not file answer to raise the issue of whether or not, in any event, the plaintiff is entitled to recover. If the Court determines under Rule 56(c) that plaintiff under the

facts stated in his complaint, cannot recover on any theory that might be presented under the plaintiff's pleading, then the motion should be sustained.

Plaintiff points out to the Court that before the Court can sustain a motion for summary judgment offered by the defendants in this case, he must find *first,* that there is absolutely no genuine issue of material fact existing in this action; *second,* that defendants are absolutely entitled to judgment as a matter of law in this action; and *third,* both of the above conditions must co-exist in this action before the motion can be sustained. Plaintiff is correct in his statement of the law, but if the defense of immunity in this case must be sustained, then there remains no issue of fact to be determined.

In actions of this kind the Court is required to determine a conflict that arises by reason of the doctrine of executive or official immunity on the one hand, and the protection of the individual citizen against damage caused by the oppressive or malicious action of a public officer. The courts have consistently undertaken to shield responsible government officers from harassment and inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities. See *Barr* v. *Matteo,* 360 U.S. 364, 365; and *Gregoire* v. *Biddle,* 177 F. 2d 279, 581, 2 CA.

It has been held that as to judicial and executive officers, the test to determine the existence of immunity from suits for monetary recovery based on allegedly wrongful acts is whether or not the officers were acting within the scope of their authority or in the discharge of their duties. Initially, the broadest interpretation of scope of authority was applied to judicial officers so as to protect them from civil suits to recover for actions taken by them in the exercise of

their official functions, irrespective of the motives with which those acts were alleged to have been performed. The doctrine first applied to heads of executive departments and excused them from liability provided the action had more or less connection with the general matters committed by law to their control or supervision. Later the doctrine of broad interpretation began to spread to subordinate officials, directly leading to the modern approach or official immunity described in *Gregoire* v. *Biddle, supra,* where it was said:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truent to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has

been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." 177 F. 2d at 581.

The foregoing statement was approved in *Barr* v. *Matteo, supra,* and in that case the Supreme Court held that the doctrine of executive immunity would apply despite the allegations of malice in the complaint, provided that the action complained of was within the outer perimeter of the officer's line of duty. This is simply another way of stating that the act must have more or less connection with the general matters committed by law to the officer's control or supervision and not be manifestly or palpably beyond his authority. *Norton* v. *McShane,* 332 F. 2d 855, 859.

Again it was said in the *Barr-Matteo* case that the rank of the officer does not determine the applicability of the doctrine of immunity. In that case it was said, p. 573:

> "To be sure, the occasions, upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of *discretion,* it entails. It is not the title of his office but the *duties* with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' Spalding v. Vilas, supra, 161 U.S. at page 498. 16 S.Ct. at page 637—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." 360 U.S. at

572—74, 79 S.Ct. at 1340, 1341. [Emphasis added.]

There is another factor which must be considered in determining the application of the immunity rule in cases of this kind. The Courts have held that to be immune the officer must have been performing a discretionary function and in the case of *Gustavsson Contracting Company* v. *Floete,* 299 F. 2d 655, 659, CA 2, the Court stated, page 659:

> "There is no litmus paper test to distinguish acts of discretion * * *, and to require a finding of 'discretion' would merely postpone, for one step in the process of reasoning the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexations or fictitious suits and alleged personal liability?"

The doctrine of official immunity has been applied by Federal Courts in suits brought against numerous officials for many different kinds of torts, and by the great weight of authority, law enforcement officers are immune from civil suits based upon allegedly malicious acts. In the case of *Swanson* v. *Willis,* 114 F. Supp. 434, affirmed in 220 F. 2d 440, CA 9, where a defendant, a former deputy United States Marshal, was sued for damages by reason of battery and false arrest of the plaintiff, committed while defendant was arresting or maintaining custody of the plaintiff, it was held that there were no facts alleged from which it could be inferred that the defendant acted outside the scope of his authority, as that term is explained in *Cooper* v. *O'Connor,* 99 F. 2d 143, discussed in *Hartline* v. *Clary,* 141 F. Supp. 151, 157:

> "In determining whether these defendants acted within the scope of their authority, the

Court may properly take official notice of official duties of each and thus determine whether the acts charged fell within the scope of their authority. *Cooper* v. *O'Connor,* 99 F. 2d 135, 139. This case held that, in determining this question:

"'It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute (*United States* v. *Birdsall,* 233 U.S. 223, 230—231, 34 S.Ct. 512, 58 L.Ed. 930); or even that they should be specifically directed or requested by a superior officer. *Mellon* v. *Brewer,* 57 App. D.C. 126, 129, 18 F. 2d 168, 171, 53 A.L.R. 1519, certiorari denied, 275 U.S. 530, 48 S.Ct. 28, 72 L.Ed. 409. It is sufficient if they are done by an officer *in relation* to matters committed by law to his control or supervision. [Emphasis supplied.] (*Spalding* v. *Vilas,* 161 U.S. 483, 498, 16 S.Ct. 631, 637, 40 L.Ed. 70; and see *Lang* v. *Wood,* 67 App. D.C. 287, 288, 92 F. 2d 211, 212); or that they are governed by a lawful requirement of the department under whose authority the officer is acting.'"

Furthermore under the facts of this case, whether immunity is to be afforded these defendants is a matter to be determined under Federal Law, *Wheeldin* v. *Wheeler,* 373 U.S. 647, 652, while in common law actions against State officers, the immunity doctrine is governed by State law. *Nesmith* v. *Alford,* 318 F. 2d 110, CA 5. Cf. *Mayor* v. *Cooper,* 6 Wall 247 and *Tennessee* v. *Davis,* 100 U.S. 257.

Though plaintiff contends his action is grounded on liability imposed on defendants under state law following *Firmer* v. *Rutherford,* 136 Kan. 298, it now convincingly appears from the record that the conduct of defendants was indeed within the outer perimeter of their line of duty. In support of the motion for summary judgment the defendant Willingham has

filed his affidavit outlining his duties and responsibilities as Warden of the United States Penitentiary at Leavenworth, Kansas, further showing that plaintiff Morgan is an inmate of the institution, which fact is not denied, and that the only contact Willingham has had with Morgan has been inside the walls of the United States Penitentiary and in performance of Willingham's official duties as Warden of that institution. Similarly the defendant Jarvis has filed his affidavit in support of the motion for summary judgment in which he states that he is the Chief Medical Officer at the United States Penitentiary at Leavenworth and he is responsible for the medical care and treatment of 2059 inmates and 417 employees and has the overall administrative responsibility for the conduct of the prison hospital and the medical care and treatment of the inmates and employees, including the supervision of the medical staff and the responsibility for determining the need for and suitability of all types of drugs and medicines used at the institution, the purchasing of the same as well as the administration of them. He further states in his affidavit that the only contact he had with plaintiff Morgan has been in the prison hospital in the penitentiary and then only in the performance of his duties as Chief Medical Officer with regard to the medical care and treatment, diagnosis and routine physical examination of plaintiff.

To offset these sworn statements of defendants, plaintiff has filed a responsive affidavit, stating in substance that he is and has been a prisoner confined in the United States Penitentiary at Leavenworth; that the defendants have waived their defense of immunity in that they had filed an answer in the State Court in which this action was originally instituted, and in which answer no defense of immunity was set forth or

alleged and that it was not until the motion for summary judgment was filed that the contention of immunity was brought into this suit; that witnesses by which plaintiff could refute the defendants' claim that their only contact with him was in their official capacity are no longer at the penitentiary and their whereabouts are unknown, and plaintiff cannot now obtain their statements for such refutation; that he has been kept under lock and key and prevented from contacting witnesses and has been prevented from using law books and legal materials that would be helpful to him in presenting his case, and that the conduct of the defendants in belatedly raising the claim of immunity has misled him and that he has had no opportunity to fairly oppose it. He further states that defendants committed the tortious acts upon him alleged in his complaint while under the influence of alcohol or other intoxicants, without any provocation whatsoever.

The Court has reviewed the entire file in this case, has examined the affidavits and the authorities cited by the parties and many more. The Court is persuaded that none of the specific charges made and stated by plaintiff overcome the undisputed fact that all of the activities of the defendants Willingham and Jarvis and their conduct come within the ambit of their duties and responsibilities as Warden and Chief Medical Officer respectively of the Penitentiary, and the charge that they acted maliciously and without provocation or while under the influence of intoxicating liquor does not remove or restrict the broad rule of immunity. See *Hartline* v. *Clary* (*supra*). Also see *Barr* v. *Matteo* (*supra*) at page 576 where it was said:

> "To be sure, as with any rule of law which attempts to reconcile fundamentally antagonis-

tic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."

While it is not raised or contended by the plaintiff, the Court notes in passing that this action cannot be sustained under the authority of the Civil Rights Act, 42 U.S.C. § 1983, for the reason that to sustain an action under that provision of law, the person charged must be acting under color of State law whereas in the instant suit the defendants were acting under color of Federal law. *Papagianakis* v. *The Samos*, 186 F. 2d 257, C.A. 4.

For the reasons stated above the Court now determines that the complaint fails to state a claim upon which relief can be granted as to the defendants Willingham and Jarvis, therefore the motion for summary judgment filed by these two defendants must be granted.

It is therefore ordered that the motion of defendant John T. Willingham and C. A. Jarvis for summary judgment against the plaintiff, Daniel Morgan, be and the same is hereby granted, and the plaintiff's complaint and the cause of action sought to be stated therein against the defendants Willingham and Jarvis is dismissed.

It is so ordered.

DATED at Topeka, Kansas this 14th day of December, 1966.

/s/ GEORGE TEMPLAR
United States District Judge

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